No. 12727

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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California State Board of Equalization,

*Appellant,*

*vs.*

George T. Goggin, Trustee in Bankruptcy of the Estate of West Coast Cabinet Works, Inc.,

*Appellee.*

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## APPELLANT'S REPLY BRIEF.

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Edmund G. Brown,
*Attorney General,*

James E. Sabine,
*Deputy Attorney General,*

Edward Sumner,
*Deputy Attorney General,*

600 State Building,
Los Angeles 12, California,

*Attorneys for Appellant.*



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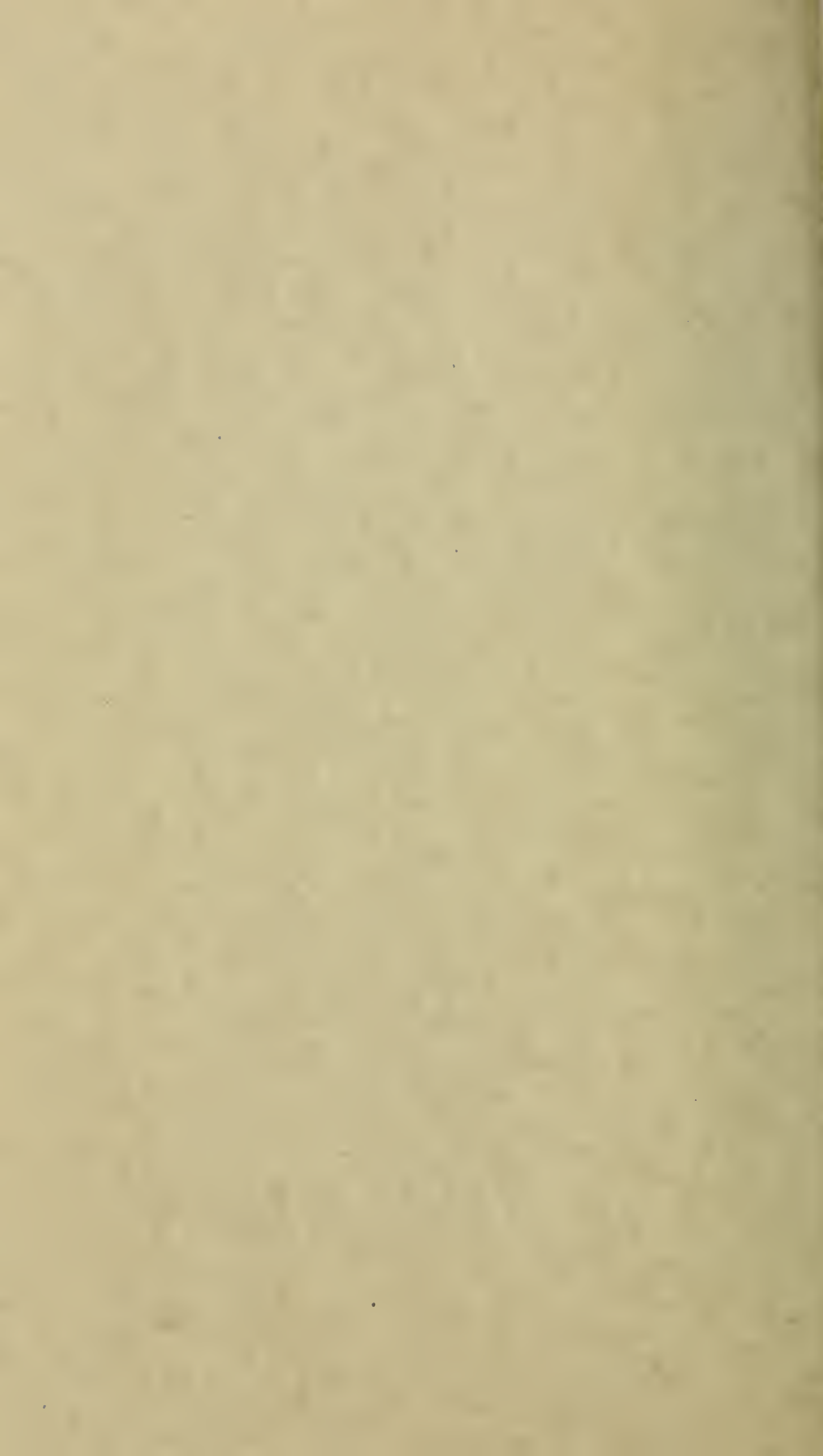

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## APPELLANT'S REPLY BRIEF.

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### Preliminary Statement.

The briefs filed by appellee and *amici curiae* are for the most part concerned with matters discussed by the District Judge in his opinion and analyzed in Appellant's Opening Brief.

Both appellee and *amici curiae* fail to recognize that the broad question presented in this appeal is whether this Court should hold that trustees in bankruptcy in their fiduciary capacities are subject to the non-discriminatory tax imposed by the California Sales and Use Tax Law in connection with sales of tangible personal property amounting to millions of dollars in value over the years, the sales being made for the benefit of creditors of bankrupts and the trustees in bankruptcy being authorized under the State taxing statute to pass on *in full* to their vendees the amount of tax payable under the statute.

Although it is apparent that exempting trustees in bankruptcy from the application of the California Sales and Use Tax Law places them in a preferential position in so far as all other sellers of tangible personal property in this State are concerned, neither appellee nor *amici curiae* have demonstrated any constitutional ground upon which exemption must be predicated nor have they directed this Court's attention to matters which from a policy point of view would indicate the desirability of exempting trustees in bankruptcy from the application of the California Sales and Use Tax Law. To the contrary, both appellee and *amici curiae* have ignored the portions of Appellant's Opening Brief which go to the heart of the broad issue involved and are apparently content to indulge in generalizations predicated upon erroneous premises.

## Analysis of Appellee's Brief.

Although it is submitted that appellee's brief has ignored the basic issues presented and failed to demonstrate even remotely that the broad question presented should be answered in the negative, the Court's attention is directed to the following portions of appellee's brief lest silence on the part of appellant be misinterpreted:

1. Appellee's Preliminary Statement is entirely misleading in that it ignores the testimony of appellee [Tr. 98] to the effect that he completed two sales of cabinets on April 23 and May 14, 1946, respectively. Also ignored is the audit of appellee's activities during the period March 12, 1946, to May 14, 1946, inclusive [Tr. 64-66], which discloses that various sales of tangible personal property at retail were made by appellee during that period. (See also, App. Op. Br. 3-7.)

2. In discussing appellee's activities, after adjudication, appellee cites at page 3 of his brief, pages 95 and 96 of the transcript. No reference is made to page 98 of the transcript, *supra.*

3. Commencing at page 7 of appellee's brief it is contended that appellant's counsel have erroneously set forth the purport and effect of the District Court's decision, and this portion of appellee's brief is preceded by appellee's version of the decision below. The decision of the District Judge is, of course, available to this Court and it will obviously serve no purpose for counsel to belabor their respective interpretations of that decision. It is, however, respectfully submitted that when the portions of the decision below referred to by appellee in his brief are examined in light of the surrounding context, it will be apparent that Appellant's Opening Brief does not erroneously set forth the purport and effect of the District Court's decision.

For example, appellee fails to recognize that if trustees in bankruptcy are not "persons" within the meaning of the California Sales and Use Tax Law that Law would not apply to them regardless of the nature of their activities. (Appellee's Br. 9.) And this would be true even if trustees in bankruptcy could be taxed without specific congressional consent. We are unable to perceive how it can be conceded that trustees in bankruptcy are "persons" within the meaning of the California Sales and Use Tax Law when they conduct the business of a bankrupt and yet argued that trustees in bankruptcy are not "persons" when they are not so engaged. It is submitted that appellee fails to recognize that whether or not trustees in bankruptcy are included within the definition of "persons"

as that term is used in the California Sales and Use Tax Law, is a matter involving only the construction of the State taxing statute and not any other.

4. Under the heading "The Findings Are Supported by the Record" (Appellee's Br. 10) appellee alleges that "It must be presumed as a matter of law" that appellant would enforce the provisions of the California Sales and Use Tax Law. Appellee fails to note, however, that it must likewise be presumed as a matter of law that appellant would proceed only in a lawful manner. And that is precisely why appellant has pointed out in its opening brief that there is nothing in the record to support the issuance of an injunction against appellant.

In so far as the District Judge's Finding VIII is concerned (Appellee's Br. 11), see appellant's Objections to Proposed Findings Prepared by Appellee [Tr. 37, last paragraph].

Although appellee asserts that the record herein does not disclose that the Board would not seek to compel payment of the tax involved by appellee or from the instant bankrupt estate he again fails to note that there is nothing in the record to support his contention that appellant would have proceeded in an improper or unlawful manner.

5. Appellee's discussion of the jurisdictional aspect of this case ignores the fact that the District Judge himself raised and considered the jurisdictional question.

6. In arguing that the proceedings below did not amount to a suit against the State of California without its consent (Appellee's Br. 12, *et seq.*), appellee

makes the erroneous contention that "Appellant came into the Bankruptcy Court to license the Trustee and receive funds from the bankrupt estate." This, of course, is not so. To the contrary, we believe this Court can take judicial notice of the fact that appellee like, indeed, all retailers in this State, applied to appellant for a permit under the California Sales and Use Tax Law and that appellee filed tax returns with appellant and paid taxes due under the California Sales and Use Tax Law to appellant. [See also Tr. 88].

Appellee cites no authority for the broad statement at the commencement of page 13 of his brief that all persons dealing with officers of the court in bankruptcy proceedings during the administration of bankrupt estates are subject to the summary jurisdiction of the Bankruptcy Court. The fallaciousness of this contention need not be demonstrated.

7. Commencing at page 13 of appellee's brief, appellee contends that the instant case falls within one of the exceptions to the well established general principle that a State may not be sued without its consent either directly or through one of its duly constituted agencies. The exceptions referred to by appellee all involve acts of State officials or agencies which are not legally authorized or which exceed or abuse the authority or discretion conferred upon such officials or agencies by State law. The record in the instant case fails to disclose any unlawful or wrongful action on the part of appellant.

8. Appellant does not contend that a Federal Court's jurisdiction may be defeated by the enactment of a State statute (see App. Op. Br. 14). The ques-

tion actually presented is whether jurisdiction to issue an injunction against the State taxing agency exists in the absence of any improper or wrongful action on the part of the State agency.

9. Although it is true that the tax liabilities incurred by a trustee in bankruptcy during his administration of a bankrupt estate constitute administrative expenses (Appellee's Br. 15) this fact does not in and of itself give the Bankruptcy Court summary jurisdiction over those to whom such administrative expenses would be payable if proper.

Section 62(a) of the Bankruptcy Act provides that doubtful items of administrative expense are to be reported to the referee having jurisdiction and that the referee shall then order the trustee to pay or not to pay the doubtful items as the case may be. It is clear (2 Remington on Bankruptcy 150, *et seq.*) that those who seek payment of doubtful items of administrative expense may not file claims for those items with the Bankruptcy Court. And, it is additionally clear that, if a trustee in bankruptcy has been ordered not to pay a doubtful item, any person thereafter seeking payment may thereupon sue the trustee with or without the permission of the Bankruptcy Court as the case may be. In this connection, see *In re Kalm & Berger Mfg. Co.,* 165 Fed. 895, and *In re Roberts,* 169 Fed. 1022.

10. Commencing at page 16 of appellee's brief, it is contended that appellant acquiesced in the Bankruptcy Court's jurisdiction. This contention, however, overlooks the well established principle that parties cannot, even by mutual consent, confer upon a court

jurisdiction over a subject matter outside the jurisdiction conferred by the provisions establishing the court.

It is too well established to warrant citation that Federal District Courts are courts of limited jurisdiction.

11. In contending that the California Sales and Use Tax Law does not afford a trustee in bankruptcy a plain, speedy and efficient remedy (Appellee's Br. 18, *et seq.*) appellee ignores the fact that if he had properly reported the instant tax liability to the referee pursuant to Section 62(a) of the Bankruptcy Act, and the referee had ordered the appellee not to pay the item, the within estate could have been lawfully distributed without regard to the tax item and without the possibility that the trustee might be subject to surcharge, if appellant had not commenced a timely action against appellee to compel payment. Furthermore, appellee ignores entirely the provisions of the California statute which authorize him to collect the full amount of the tax from his vendees. If appellee had acted with due regard to the State's interest in this matter, he would have collected the taxes in question and held them subject to a determination of the issues raised in this appeal. Regardless of the outcome of this appeal, assets of the estate would not have been involved.

The contention that appellee did not have a plain, speedy and efficient remedy under State law can only be made with a complete disregard for the provisions of State law.

12. In referring to Part II of Appellant's Opening Brief (see appellee's brief commencing at page

21) appellee seeks to persuade this Court that appellant's analysis of the opinion below is fallacious in many respects.

For example, the appellee quotes a portion of the first paragraph on page 37 of Appellant's Opening Brief and refers to it as a "statement . . . that the opinion [below] concludes 'that the California Sales Tax cannot constitutionally be imposed upon trustees in bankruptcy in connection with liquidation sales made by them.' " Reference to page 37 of Appellant's Opening Brief will disclose appellant's statement that "Commencing at page 654 of the reported Opinion below, the learned District Judge cited various cases . . . to support his conclusion, which was quite apparent at this point in his Opinion, that the California Sales Tax cannot constitutionally be imposed upon trustees in bankruptcy in connection with liquidation sales made by them."

Appellee also takes exception to the statement on page 47 of Appellant's Opening Brief that the District Judge erroneously assumed that compliance with the California Sales and Use Tax Law by appellee would have resulted in interference with the Bankruptcy Court's control of appellee's activities and the property in its custody. Ignored entirely are pages 37 to 41 of Appellant's Opening Brief.

13. The closing portion of appellee's brief ignores the basic question presented on this appeal and the practical operation of the State taxing statute in relation to the field of bankruptcy. (See App. Op. Br. 30-36.)

## Analysis of Amici Curiae Brief.

The brief filed by *amici curiae* is unfortunately replete with generalities, references to factual situations other than the one disclosed by the record herein, and repeated reiterations that the imposition of the California Sales Tax upon trustees in bankruptcy would amount to an interference with the Bankruptcy Court's exclusive jurisdiction over bankruptcy estates. Furthermore, the brief of *amici curiae* ignores the basic question presented, as set forth in the opening paragraphs of this brief and the latest decisions of the United States Supreme Court upholding non-discriminatory State taxes.

> 1. Whereas, appellee indicates at page 9 of his brief that the Judge below did not attribute any "sanctity" to the trustee herein because of his status as an officer of the Bankruptcy Court, and whereas appellee seeks to persuade this Court that the Judge below concluded that the California Legislature could include trustees in bankruptcy (such as appellee) within the scope of the California Sales and Use Tax Law if it chose to do so, *amici curiae,* to the contrary, take the position that trustees in bankruptcy are immune from state taxation in making liquidation sales because they act as officers of the judicial arm of the Federal Government.
>
> 2. It is stated at page 8 of the *amici curiae* brief that counsel for appellant contended in the District Court that the sales made by an individual who acts as a trustee in bankruptcy in numerous bankrupt estates should be aggregated in considering the tax liability of a trustee in bankruptcy in his fiduciary capacity in so far as a single estate is concerned. We

do not recall making that contention, and do not advance it here. However, inasmuch as *amici curiae* have raised the point, if it is true (as indeed it is) that a single individual makes numerous sales of tangible personal property as trustee in bankruptcy of numerous bankrupt estates, that is all the more reason for denying him a preferential position in so far as all other sellers of tangible personal property in this State are concerned with regard to the application of a non-discriminatory tax which may be passed on in full to the purchasers of said tangible personal property.

3. In contending that there is no basis for the "bridging over" argument of appellant, *amici curiae* fail to recognize that the "bridging over" factual aspect of the case is pertinent to a consideration of whether the California Sales and Use Tax Law is applicable to liquidation sales made by a trustee in bankruptcy who has conducted the business of a bankrupt. (See App. Op. Br. 20.)

4. *Amici curiae* do not answer but ignore pages 37 to 41 of Appellant's Opening Brief and infer at page 13 of their brief that none of the enforcement provisions of the California Sales and Use Tax Law may properly be invoked with respect to trustees in bankruptcy.

5. We trust the Court will not be misled by the attempt to persuade it that merely because all of the enforcement provisions of the California Sales and Use Tax Law are admittedly not applicable to trustees in bankruptcy, a judicial determination of that fact would result in an emasculation of the State taxing statute which would "deny the State the traditional

and almost universal method of enforcing prompt payment." (*Amici Curiae* Br. 13.)

6. Likewise, we trust this Court will not be misled by the subtle inference (*Amici Curiae* Br. 13) that upholding the application of the non-discriminatory State tax to trustees in bankruptcy will "precipitate conflict or occasions for conflict between federal administration of the Bankruptcy Act and state administration of the Sales and Use Tax Law; . . ."

7. Equally misleading is the statement (*Amici Curiae* Br. 13) that the State did not intend, in the absence of Congressional consent, to interfere with or to frustrate the powers conferred upon Congress by the Bankruptcy Clause of the Constitution. We are unable to comprehend the repeated references to interference with the Federal Government's supreme power in the bankruptcy field when the record herein discloses no such interference and when this Court may take judicial notice of the fact that there never has been any interference.

8. *Amici curiae,* like appellee, concede that the California Sales and Use Tax Law applies to trustees in bankruptcy when they are operating and carrying on the business of the bankrupt. We are unable to comprehend, as we have stated above, how the term "persons" in the California Sales and Use Tax Law can be construed as including only certain trustees in bankruptcy and not all of them, regardless of the nature of their activities. (*Amici Curiae* Br. 15.)

9. Commencing at the last paragraph of page 15 of their brief, *amici curiae* refer to the "claim" for an administrative tax liability and "objections" thereto. This is again misleading inasmuch as "claims", as that

term is used in the Bankruptcy Act, are not filed with the Bankruptcy Court in bankrupt estates for administrative items. Nor are we aware of any provision in the Bankruptcy Act for the hearing of objections to "claims" for administrative items.

10. On page 16 of their brief *amici curiae* refer to "The contention that the trustee could be held in his individual capacity" for non-payment of administrative items. This statement is misleading in that it infers the possibility of surcharge even if a trustee in bankruptcy complied with Section 62(a) of the Bankruptcy Act. Additionally, the individual liability of appellee is not involved herein.

11. It is interesting to note that in none of the decisions cited by *amici curiae,* commencing at page 17 of their brief, is there any discussion of the issues raised by appellant herein.

12. The excerpt from the brief filed by *amici curiae* in *State Board of Equalization v. Boteler,* 131 F. 2d 386, is certainly irrelevant, if not misleading, in that it seeks to persuade this Court that the questions here presented are the questions quoted on page 25 of the *amici curiae* brief. It is interesting to note that the first question set forth assumes that the State of California asserts the right to project itself into the administration of bankrupt estates and that the second question assumes an illegal encroachment upon the duties and prerogatives of officers of the District Court. The record herein does not show nor can it be shown with respect to any bankruptcy matter, commencing with the enactment of any taxing statute by the Legislature of the State of California, that the State of California has sought, or is seeking,

the right to project itself into the administration of bankrupt estates or that the State of California seeks to illegally encroach upon the duties and prerogatives of officers of the United States District Court.

The only question before this Court, if we may again state it, is whether or not a non-discriminatory State tax enacted for revenue raising purposes only and not for regulation in any respect whatsoever, may properly be imposed upon trustees in bankruptcy in connection with liquidation sales made by them.

13. Commencing at page 35 of their brief *amici curiae* purport to answer and reply to appellant's brief. It is apparently the view of *amici curiae* that even though a trustee in bankruptcy be operating the business of a bankrupt and, accordingly, concededly subject to the California Sales and Use Tax Law the gross receipts derived from liquidation sales during the course of operation are not to be included in the measure of tax despite the fact that the California Law so provides, as appellant has attempted to point out in its opening brief.

The Court's attention is directed to the distinction to be made between whether the California Sales and Use Tax Law purports to include in the measure of tax the gross receipts derived from liquidating sales, and, if so (the California courts having so held), whether there is any Federal constitutional or statutory prohibition against such inclusion.

14. *Amici curiae* state, at pages 37 and 38 of their brief, that the questions here involved have already been decided not only by this Court but by the District Courts in this State as well. This is, of course, not so, as *amici curiae* themselves have recognized at

page 11 of their brief whereat they state that in June of 1945 the definition of "person" in the California Sales and Use Tax Law was amended by the inclusion of trustees and the United States. This Court has had occasion to consider whether trustees in bankruptcy were "persons" within the meaning of the California Sales and Use Tax Law prior to the aforesaid 1945 amendment. This is the first appeal before this Court involving the effect of the 1945 amendment and whether the California Sales and Use Tax Law, as it now reads, purports to apply to trustees in bankruptcy.

15. *Amici curiae* seek to distinguish *State of Missouri v. Gleick,* C. C. A. 8, 135 F. 2d 134, upon the ground that the Eighth Circuit case involved the application of a state statute to a trustee in bankruptcy by virtue of his status as an employer, whereas the California statute applies to a trustee in bankruptcy as a "retailer." We are unable to perceive a logical or legal basis or policy consideration upon which such a distinction can be predicated, especially so when the California tax, like the Missouri tax, is a non-discriminatory one, and even more especially so when the California tax, unlike the Missouri tax, can be passed on in full to those who purchase assets from a bankrupt estate. It would appear, if distinctions are to be drawn, that the Missouri tax is more vulnerable to attack in that payment of that tax would deplete the assets of a bankrupt estate whereas compliance with the California Sales and Use Tax Law has no

impact whatsoever upon the assets of a bankrupt estate. (*Amici Curiae* Br. 38, 39.)

16. The discussion of congressional intent in enacting former Section 124(a), Title 28, U. S. C., ignores the subsequent decision of the United States Supreme Court in *Graves v. People of State of New York, ex rel. O'Keefe* (1938 Term), 306 U. S. 466, 59 S. Ct. 595, 83 Law Ed. 927, and subsequent pertinent decisions. It is submitted that it cannot be validly argued subsequent to the *Graves* case, that non-discriminatory state taxation of trustees in bankruptcy is dependent upon congressional consent. (*Amici Curiae* Br. 39, 40.)

17. Although *amici curiae* allege on pages 40-42 of their brief that many of appellant's "objections and complaints" have already been answered by this Court, we are unaware of any decision of this Court in which the contentions advanced by appellant herein are discussed.

18. *Amici curiae* close their brief with a final attempt to persuade this Court that upholding the imposition of the California Sales Tax upon trustees in bankruptcy would result in an interference with bankruptcy administration. We direct the Court's attention to a significant omission from the brief filed by *amici curiae,* namely, even an attempt to demonstrate that the alleged interference would result or that interference has been experienced in the past. As we have pointed out above, the record now before the Court fails to disclose any interference whatsoever.

## Conclusion.

Inasmuch as appellee and *amici curiae* have failed to demonstrate that there is any bar to the imposition of the non-discriminatory California Sales Tax upon trustees in bankruptcy making liquidation sales of tangible personal property, and inasmuch as such a bar does not exist, under the latest decisions of the United States Supreme Court, it is submitted that the decision below should be reversed.

Respectfully submitted,

EDMUND G. BROWN,
*Attorney General,*

JAMES E. SABINE,
*Deputy Attorney General,*

EDWARD SUMNER,
*Deputy Attorney General,*

*Attorneys for Appellant.*